No. 75-591

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOE RAYMOND DIEZ AND PETER A. PALORI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Middle District of Florida, petitioner Palori was convicted of conspiring to defraud the United States by impeding the Internal Revenue Service in assessing and collecting income taxes, in violation of 18 U.S.C. 371 and of willfully attempting to evade his income taxes for the years 1965 through 1968, in violation of 26 U.S.C. 7201. Petitioner Diez and one DeGuzman were convicted of conspiracy.[1] Palori was sentenced to four years in prison and a $5,000 fine. Diez was sentenced to 18 months in prison. The court of appeals affirmed (Pet. App. A-1 to A-16).

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[1]DeGuzman was also convicted of filing a return in his own behalf for 1967 in which he falsely reported as his own income the profits from a land transaction. He was given a suspended sentence and did not appeal (Pet. App. A-4, n.1).

The evidence relating to the conspiracy count established that Palori sold shares in various parcels of real estate which he owned, but that he arranged for several of his relatives to act as nominal owners or brokers in the transactions and to report part of the profits from the sales on their own tax returns. Diez, Palori's uncle, reported part of the profit from one of the sales, as well as two brokerage commissions allegedly received in connection with other transactions. DeGuzman, Palori's accountant, reported part of the profit from one of the real estate transactions on his tax return. The government contended that all of this income was properly attributable to Palori. James Garrett and Clarence Prevatt, two unindicted co-conspirators, also participated in some of the transactions (Pet. App. A-4).

1. Petitioners argue (Pet. 7-9) that the declarations of the unindicted co-conspirators should not have been admitted into evidence because the government did not prove the existence of a subsidiary conspiracy to conceal the main conspiracy. Here, however, as in *Forman* v. *United States*, 361 U.S. 416, the declarations of the unindicted co-conspirators were admissible as exceptions to the hearsay rule because they were made in furtherance of a continuing conspiracy. This application of the long-standing hearsay exception does not violate the right to confrontation secured by the Sixth Amendment. See *Krulewitch* v. *United States*, 336 U.S. 440, 443; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Dutton* v. *Evans*, 400 U.S. 74, 86 (plurality opinion of Stewart, J.).[2]

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[2]As the court of appeals recognized (Pet. App. A-6, n. 5), a number of the statements to which petitioners objected were repetitive of earlier testimony to which they did not object. Moreover, the great majority of the remaining statements of which petitioners complain (Pet. 5-6) were against the declarant's interest as well as in furtherance of the conspiracy.

Contrary to petitioners' assertion (Pet. 8-9), the decision below does not conflict with *Grunewald* v. *United States*, 353 U.S. 391; *Krulewitch* v. *United States*, 344 U.S. 440; or *Lutwak* v. *United States*, 344 U.S. 604. In those cases, the declarations at issue were made after the central objective of the conspiracy had either been accomplished or defeated. Here, on the other hand, as the court of appeals correctly recognized (Pet. App. A-6 to A-7), the declarations "were part of the central conspiracy itself, which had not terminated when those statements were made."

2. Petitioners also argue (Pet. 9-10) that their convictions should be reversed because certain declarations of co-conspirators which were not in furtherance of the conspiracy were admitted into evidence. They contend that these declarations were incriminating admissions and thus cannot possibly have been in furtherance of the conspiracy. However, the fact that some parts of a deceptive statement contain elements consistent with the evidence the government offered does not warrant its classification as an admission or a confession, rather than as a statement in furtherance of the conspiracy. The relevant consideration is whether the statement as a whole is "made in furtherance of the objectives of a going conspiracy." *Krulewitch* v. *United States*, *supra*, 336 U.S. at 443. Thus, the "co-conspirators' statements were deceptive in design" (Pet. App. A-8) and therefore admissible as in furtherance of the conspiracy.[3]

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[3]Petitioners' final argument (Pet. 10-12), devoted to an attack on the sufficiency and quality of the proof against Diez, is simply repetitive of their contention that the declarations of the unindicted co-conspirators were inadmissible. The argument that practically all of the evidence against Diez "was hearsay which was admitted allegedly under various exceptions to the hearsay rule" (Pet. 11-12) refers to the fact that there were many declarations of his co-conspirators admitted against him. But since they were made during the life of a going conspiracy and in furtherance of its objective, they were properly admissible.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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